

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERESA L. BRAZIL)	
Claimant)	
)	
VS.)	
)	
BANK ONE CORP.)	
Respondent)	Docket No. 253,906
)	
AND)	
)	
KEMPER INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

Both parties requested review of the February 25, 2008 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on June 3, 2008.

APPEARANCES

Michael P. Bandre, of Overland Park, Kansas, appeared for the claimant. Frederick J. Greenbaum, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agreed that while originally at issue, timely notice of injury and the medical bills tendered by Dr. Simon are no longer at issue and need not be addressed in this Order.

ISSUES

The ALJ concluded claimant proved that she aggravated a preexisting back condition in the course of her employment with respondent and ultimately awarded a 2.5 percent functional impairment, a percentage that reflects an average of the functional impairments offered by the testifying physicians as well as a credit of 10 percent functional impairment for a subsequent injury.¹ The ALJ declined to award work disability as he found

¹ ALJ Award (Feb. 25, 2008) at 7.

that claimant did not lose her job due to her work-related injury, but instead due to market forces.

Both claimant and respondent appealed this Award. Claimant contends the Award should be significantly modified. First, claimant believes the ALJ should have assigned a 25 percent permanent partial impairment² based upon Dr. Koprivica's testimony as any reliance on Dr. Zarr's opinions was misplaced. Claimant also argues the ALJ erred in failing to award a 62.5 percent work disability, thus reflecting her 25 percent task loss and 100 percent wage loss. Alternatively, if the Board finds that a wage should be imputed, claimant argues that she has sustained, at least, a 31 percent wage loss. It is important to note that claimant's counsel concedes that any work disability ceases as of January 2007 when claimant was diagnosed with an autoimmune disease and was no longer working or looking for work. Claimant acknowledges that her reason for not working beyond this point in time is due to her unrelated autoimmune disease and that she does not request workers compensation benefits beyond this time.

Respondent asserts that claimant's evidence failed to establish that her low back complaints arose out of and in the course of her employment with respondent, consistent with the Court of Appeals' rationale in *Johnson*³. Thus, the Award should be reversed. In the alternative, if the claim is found compensable respondent then argues that the 2.5 percent functional impairment rating found by the ALJ should be affirmed. Respondent also asserts that the evidence supports the ALJ's conclusion that claimant's lack of a comparable wage is unrelated to her work injury but instead, is attributable to her autoimmune disease and market forces which left her unemployed. Finally, even if claimant is otherwise entitled to a work disability, she has failed to establish that she made a good faith effort to find appropriate post-injury employment and therefore, a wage should be imputed to her. And because claimant is capable of earning a comparable wage, she is not entitled to any work disability under K.S.A. 44-510e(a), limiting her recovery to the 2.5 percent functional impairment assessed by the ALJ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out the facts in a detailed and accurate manner, all of which are supported by the record. As such, the Board finds that it is not necessary to repeat those facts in this order and the Board merely adopts that recitation as its own and will refer to the facts only as necessary to explain the Board's decision.

² All ratings are to the body as a whole unless indicated otherwise and were issued pursuant tot he 4th edition of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

³ *Johnson vs. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, rev. denied 281 Kan. ____ (2006).

This is the second time this claim has been before the Board.⁴ At its first presentation, claimant was seeking benefits as a result of her accident. Claimant was employed as a wholesale mortgage underwriter, hired to review mortgage files and determine their suitability for purchase. This involved travel both by plane and car as well as lifting files and boxes along with reviewing documents.

Respondent disputed the compensability of claimant's claim asserting that she failed to prove her low back injury arose out of and in the course of her employment with respondent. Respondent maintained that claimant was merely sitting in a chair and noticed that she had low back and leg pain. And if she had any low back complaints they were attributable to an earlier accident in 1992.

The ALJ concluded that claimant had sustained her evidentiary burden and awarded benefits. On appeal one Board Member⁵ concluded that "claimant's work activities, specifically the act of sitting for extended periods of time, aggravated claimant's preexisting low-back condition and caused her low-back symptoms."⁶ The ALJ's Order was affirmed and claimant began receiving treatment. Claimant was treated conservatively and in January 2001 was assigned work restrictions.

Respondent went out of business on May 31, 2000, laying off most of its employees including claimant. She sought and obtained employment elsewhere for short periods of time. Claimant relocated to Colorado (where her treatment continued) and obtained employment at a school. In December 2001 claimant injured her back lifting a child. That accident resulted in another workers compensation claim in Colorado that was settled for \$12,000 based upon a 10 percent permanent partial impairment. This 10 percent impairment rating was apparently based upon the 3rd edition of the *Guides*. And it is unclear whether and to what extent that rating took into account claimant's earlier injury.

The instant claim proceeded to Regular Hearing in September 2007. In addition to offering the claimant's own testimony at the regular hearing and in earlier discovery depositions, the parties stipulated to the admissibility of various medical records and the workers compensation file relative to claimant's Colorado injury. There was also testimony from Dr. Zaar (on respondent's behalf) and Dr. Koprivica (on claimant's behalf).

⁴ When serving as an ALJ, Julie A.N. Sample was assigned to this claim. She was involved in a number of preliminary hearing matters including one that was appealed to the Board. Since that time she was appointed to serve as a Board Member. Upon presentation of the instant appeal, the parties waived any potential conflict that might have been presented, allowing Ms. Sample to participate in the panel that heard oral arguments and deliberate with the 4 other members of the Board.

⁵ Gary Peterson, now retired. Only one Board Member reviews an appeal from a preliminary hearing Order.

⁶ Board Order, No. 253,906, 2000 WL 1523797 (Kan. WCAB Sept. 29, 2000).

Dr. Koprivica saw claimant on February 19, 2004. This examination took place after claimant's subsequent accident lifting a child. According to Dr. Koprivica, claimant disclosed her subsequent injury lifting a child but explained that her symptoms from that accident had largely subsided, leaving her at her pre-2001 status, as if the subsequent injury had not occurred. Indeed, after reviewing the records and the test results, Dr. Koprivica identified no structural change in claimant after the 2001 accident.⁷

Dr. Koprivica examined claimant and his report indicates that claimant had no radiculopathy, loss of reflexes, numbness or atrophy during this examination. And claimant had no positive EMG's (which would establish nerve damage). Nevertheless, based upon claimant's recitation of her job duties, namely that she did "extensive" twisting and turning throughout her day, which he interpreted to mean throughout the entire day, he concluded that she had sustained an injury while working for respondent on September 15, 1999. He opined that, based upon another physician's March of 2000 MRI report which indicated that claimant had a "loss of motion segment integrity" and slippage, claimant was entitled to a 25 percent (DRE V) permanent partial impairment.⁸ He went on to explain that the fact that claimant's back was stable during his examination did not invalidate the earlier finding of the loss of segment integrity. Thus, he maintained his 25 percent impairment finding should stand.⁹ He also testified that claimant sustained a 25 percent task loss based upon Michael Dreiling's task analysis.

After leaving respondent's employ, claimant had a variety of jobs (including the job at the daycare where she was subsequently injured) but none of those jobs translated into a wage that was comparable to her wage with respondent. At her highest wage, claimant was employed at a junior college and earned \$29,000 per year, although that job only lasted a few months. The remainder of her jobs earned her far less than this figure. Mr. Dreiling has testified that claimant has the capacity to earn between \$10-12 per hour while Terri Herde, respondent's expert, testified that claimant can earn a comparable wage (within 90 percent of her preinjury wage) working in the mortgage industry, in a job similar to that which she was performing in late 1999.

In stark contrast to the opinions expressed by Dr. Koprivica are the opinions held by Dr. Zarr, a physiatrist. Dr. Zarr first saw claimant on August 16, 2007. At this point her main complaint was persistent low back pain. He prescribed a TENS unit and physical therapy. He saw her again on September 14, 2007 and by this time, claimant had a mildly antalgic gait and was having difficulty doing deep knee bends.¹⁰ She was being seen by

⁷ Koprivica Depo. at 12.

⁸ *Id.* at 76-77.

⁹ *Id.* at 77-78.

¹⁰ Zarr Depo. at 19.

a rheumatologist who had diagnosed an autoimmune disorder and was on social security disability.¹¹

Dr. Zarr testified that claimant bears no permanent impairment under the *Guides* due to her 1999 accident as he opined that her autoimmune disorder, which he could not name or identify, was causing her back complaints.¹² It was also his opinion that any structural changes seen on the MRI's taken after claimant's 1999 accident were "irrelevant" and "insignificant".¹³ Dr. Zarr believed that while not normal, the abnormalities in claimant's back did not warrant surgery, nor did she have any radicular symptoms when he saw her.¹⁴ He further believed that she was not limited in her job prospects or her task performance as a result of her back complaints.¹⁵

After considering this evidence, the ALJ¹⁶ issued an Award finding claimant's low back complaints compensable. He averaged the functional impairment ratings offered by the competing physicians (0 percent from Dr. Zarr and 25 percent from Dr. Koprivica) and deducted 10 percent for her subsequent work-related injury. The end result was a 2.5 percent permanent partial impairment. He then went on to deny claimant's request for permanent partial general (work) disability benefits as he reasoned that -

It seems implicit in the K.S.A. 44-510e "90% rule" that the reduction in wages that triggers work disability must result in some way from the work injury. The general purpose of the workers compensation act is to provide compensation for work related injuries. And courts have recognized that the wage reduction must be related to the injury . . . Also, in a case where an accommodated injured employee's reduction in earnings was due to simply [sic] economics (a plant-wide reduction in overtime) the workers compensation board denied work disability, stating, "the board believes the fundamental function and purpose of the act requires that there be a nexus between the injury and the wage loss before that loss can be a factor used to calculate the amount of benefits."¹⁷

The ALJ considered the evidence on the issue of claimant's restrictions and how those restrictions played into her present earnings, or lack thereof and ultimately concluded that

¹¹ *Id.* at 13-14

¹² *Id.* at 18-19.

¹³ *Id.* at 50.

¹⁴ *Id.* at 33-34.

¹⁵ *Id.* at 20-21.

¹⁶ Kenneth J. Hursh was appointed to replace Julie A.N. Sample.

¹⁷ ALJ Award (Feb. 25, 2008) at 6.

“[t]here is no relationship between the claimant’s less-than-90% earnings and the work injury, so work disability shall not apply in this case.”¹⁸

At the outset, the Board must first deal with respondent’s assertion that claimant failed to prove that she sustained an accident that arose out of and in the course of her employment. Distilled to its essence, respondent maintains that claimant’s work activities were not responsible in any fashion for the spontaneous onset of her low back and leg complaints on September 15, 1999. Respondent maintains that it is more likely that claimant aggravated her preexisting condition or that claimant’s 2007 diagnosis of an as-of-yet undefined autoimmune disease is responsible for those complaints. The argument that claimant aggravated a preexisting condition as a result of the normal activities of day-to-day living stems from a recent case, *Johnson v. Johnson County*¹⁹ and the definitions of an “accident”, “personal injury” and “injury”.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.²⁰ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”²¹

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.²²

K.S.A. 44-508(d) defines “accident”:

“Accident” means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 44-508(e) defines “personal injury” and “injury”:

¹⁸ *Id.* at 6.

¹⁹ *Johnson vs. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. ____ (2006).

²⁰ K.S.A. 44-501(a).

²¹ K.S.A. 44-508(g).

²² K.S.A. 44-501(a).

“Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker’s usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

In order for a claimant to collect workers compensation benefits she must suffer an accidental injury that arose out of and in the course of his employment. Here there is no dispute that claimant was working for respondent at the time of the onset of her low back and leg symptoms. Rather, the decisive question is whether claimant sustained a personal injury by accident that arose out of her employment. Put another way, respondent contends claimant’s injury was not caused by her employment because the act of sitting in a chair at a table, even while looking through mortgage files as her normal work duties, is an act of day-to-day living and thus not compensable.

The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.²³

In *Johnson*, the claimant injured her left knee when she simultaneously turned in her chair and attempted to stand while reaching for a file that was overhead. Claimant immediately experienced severe pain in her left knee, which would not straighten. It was acknowledged that claimant had suffered previous left knee complaints before this event. And there was testimony that the employee’s injury could have occurred at any time, whether at work or elsewhere. The Kansas Court of Appeals, in reversing the Board’s award of benefits, found claimant’s activity of sitting and reaching to be a normal activity of day-to-day living. The *Johnson* Court provided a detailed analysis of accidents and how they must be “fairly traceable to the employment.”²⁴ The Court cited *Poff*²⁵ for the premise that standing and sitting are normal everyday activities.

The ALJ concluded that “by a slim preponderance of the evidence the record proved that the claimant at least aggravated a preexisting back condition out of and in the course of her employment with the respondent.”²⁶ The Board has carefully examined the evidence

²³ *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

²⁴ *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev denied* 281 Kan. ____ (2006).

²⁵ *Poff v. IBP*, 33 Kan. App. 2d 700, 106 p.3d 1152 (2005).

²⁶ ALJ Award (Feb. 25, 2008) at 5.

contained within the record along with the parties and in light of *Johnson*, a majority of the Board is not persuaded that claimant sustained an accident arising out of her employment.

As noted in *Johnson*, the mere act of standing and sitting is an act of day-to-day living and is not compensable. If it can be shown that the act or exertion of the event is unusual so as to take it outside the definition of an accident, such as the salesperson who is entering and exiting his vehicle many times during the day, then such an accident would be outside the statutory definition and no longer considered an act of day-to-day living. In this instance, claimant consistently described her job as one that involved sitting at a table and processing files, bending down and/or reaching for a file 3-4 times per hour. This description of the job is different from the "extensive" bending and twisting described by Dr. Koprivica. And in his deposition he was presented with claimant's testimony and conceded that his understanding of the job was different in terms of repetition and exertion from what claimant described.²⁷

Based upon this evidence and the *Johnson* precedent, the Board finds that claimant has failed to establish that she sustained an accident arising out of her employment with respondent. Thus, the ALJ's Award must be reversed and the remaining issues presented by the parties are moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated February 25, 2008, is reversed and claimant is denied an award against respondent based as she failed to establish that she sustained an accident that arose out of her employment based upon the *Johnson* rationale.

The balance of the Award as it relates to the costs associated with the proceedings is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2008.

BOARD MEMBER

BOARD MEMBER

²⁷ Koprivica Depo. at 30-43.

CONCURRING OPINION

I agree that the facts in this case more closely resemble *Johnson*²⁸ than they do *Anderson*.²⁹ Therefore, the doctrine of *stare decisis* compels us to follow the *Johnson* court's holding and reverse the ALJ. However, I believe that the Court of Appeals in *Johnson* incorrectly analyzed the intent of the phrase "normal activities of day-to-day living," and the above majority opinion does so as well.

The Court of Appeals in *Johnson* framed the issue as: "Was there substantial competent evidence to support the Board's conclusion that Johnson's act of standing up from a seated position arose out of her employment under K.S.A. 44-501(a) and that this act was not part of her "normal activities of day-to-day living" under K.S.A. 2002 Supp. 44-508(e)?"³⁰ The Court concluded that "[c]onsidering the facts of this case, we do not find substantial evidence to support the Board's finding that Johnson's act of standing up was not a normal activity of daily living."³¹

Although standing, sitting, bending, reaching, lifting and twisting are all activities that can be described as normal activities of day-to-day living, K.S.A. 1999 Supp. 44-508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. In this sense, it is another way of excluding personal risks from coverage under the Workers Compensation Act.

The Board has long concluded that the exclusion of disabilities, resulting from the normal activities of day-to-day living, from the definition of an injury was an intention by the Legislature to codify and strengthen the holding in *Boeckmann*.³²

The court in *Boeckmann* distinguished from its holding those cases where "the injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to support a finding of compensability.³³ Similarly, the court in *Johnson* distinguished its holding from cases where the injury is "fairly traceable to the employment."³⁴ This Board Member concludes that the Legislature did not intend for the "normal activities of day-to-

²⁸ *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, rev. denied 281 Kan. ___ (2006).

²⁹ *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

³⁰ *Johnson*, 36 Kan. App. 2d at 788.

³¹ *Id.* at 789.

³² *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

³³ *Id.* at 737.

³⁴ *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, rev. denied 281 Kan. ___ (2006).

day living” to be so broadly defined as to exclude disabilities caused or aggravated by the strain or physical exertion of work.

In this case no doctor said claimant’s back condition was such that almost any activity would have caused this injury, or that the injury would have occurred whether claimant had been working or not as was the testimony in *Boeckmann* and *Johnson*.

Nevertheless, in the absence of any expert medical testimony that claimant’s prolonged sitting at work aggravated claimant’s low back condition or caused her symptoms, as was found by the Board Member on the appeal from the preliminary hearing order, and in the absence of any credible testimony that claimant’s job duties were truly repetitive and required “extensive” bending, twisting and turning and that such activity caused or aggravated her back, this Board Member must conclude that claimant has failed to prove her injury and disability arose out of her employment with respondent.

Absent the Court of Appeal’s holding in *Johnson*, this Board Member might have concluded that claimant’s accident and resulting disability are directly attributable to her work. Although her injury may be an aggravation of a preexisting condition, it did not result from a personal risk. Claimant had been symptom free for years before this accident. Likewise, claimant’s accident did not result from an autoimmune disorder. That condition was not diagnosed until years after her accident. Nevertheless, the facts in this case are too similar to those in *Johnson* for this Board Member to ignore or distinguish. As long as *Johnson* remains good law, the Board must follow it. But some of the language in *Johnson* if misapplied could render all but the most unusual and traumatic accidents non-compensable. This could not have been the intent of the Legislature.

BOARD MEMBER

DISSENT

We respectfully disagree with the majority opinion. We agree with the concurring opinion that K.S.A. 1999 Supp. 44-508(e) excludes injuries where the “disability” is a result of the natural aging process or the normal activities of day-to-day living. But both *Boeckmann*³⁵ and *Johnson*³⁶ distinguished from their holdings cases as compensable where the injury is related to a particular strain or episode of physical exertion or is fairly traceable to the employment.

It is a significant factual distinction from this case that in *Boeckmann* and *Johnson* there was testimony that the disability would have occurred whether claimant had been

³⁵ *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

³⁶ *Johnson v. Johnson County*, 36 Kan.App.2d 786, 147 P.3d 1091, rev. denied 281 Kan. ___ (2006).

working or not. In this case there is no such testimony from a doctor that claimant's back condition was such that any activity would have caused the injury whether claimant was working or not.

Claimant had been symptom free for years before this accident and her injury did not result from a personal risk. Dr. Zarr testified that claimant has no permanent impairment due to her 1999 accident because he believed that an autoimmune disorder, which he could not name or identify, was causing her back complaints. But on cross-examination Dr. Zarr agreed that he could not state within a reasonable degree of medical probability that claimant had an autoimmune disorder in 1999. Claimant's accident did not result from an autoimmune disorder as that condition was not diagnosed until years after her accident. Moreover, Dr. Zarr also downplayed the objective medical findings relied upon by the doctors who provided treatment for claimant's low back condition after the accidental injury. Consequently, we would find that in this case Dr. Koprivica's opinion is more persuasive. And Dr. Koprivica concluded that claimant's work activities aggravated or accelerated her underlying degenerative disk disease.

We would affirm the ALJ's determination that claimant met her burden of proof to establish that she suffered a compensable work-related aggravation of her preexisting degenerative back condition. But we would further find that claimant is eligible for a work disability analysis and award at least until she suffered the subsequent intervening injury.

BOARD MEMBER

BOARD MEMBER

c: Michael P. Bandre, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge